SUPREME COURT, U. S.

JUN 7 1967

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 196~~7~~

No. ~~1450~~ 226

ALBERT COLLINS, RALPH ATKINS
and WENDELL LOVEDAY,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioners Albert Collins, Ralph Atkins, and Wendell Loveday, pray that a writ of certiorari issue to review the judgments of the Supreme Court of Tennessee entered in this cause on April 26, 1967.

CITATIONS TO OPINION BELOW

All references to the record herein will refer to the larger numbers that appear at the bottom of the pages of the certified record of the Supreme Court of Tennessee, which is filed herein, and will be designated as follows: "(R., Vol. ....., p. .....)".

Memorandum Opinion of the Supreme Court of Tennessee is not for publication and will not be reported. The opinion of the Supreme Court of Tennessee appears at R., Vol. VII, pp. 20-32, and copy is annexed hereto as an Appendix at page A-1.

JURISDICTION

Memorandum Opinion of the Supreme Court of Tennessee was filed March 10, 1967, and judgments of the Supreme Court of Tennessee were entered April 26, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

HOW FEDERAL QUESTIONS ARE PRESENTED

Petitioners were convicted in Cocke County, Tennessee, of breaking and entering a business place with the intent to commit burglary, and each received a sentence of not less than three years nor more than five years. (R., Vol. V, p. 206).

Petitioners, in substance, assigned the following errors committed by the Trial Court, which denied to them due process of law and equal protection of the law:

(1) They were denied due process of law in that at the time of their arrest none of petitioners was given a preliminary hearing.

(2) After a jury was selected, impaneled and sworn to try the issues, the indictment read and pleas entered, and petitioners had been placed in jeopardy, the Trial Judge on his own motion excused one of the jurors and substituted another juror, over objection of petitioners. When the excused juror, Theodore Parrott, was first presented he stated he had heard the case discussed "pro and con", had read in the newspapers that petitioners "were caught in the doctor's office, I just assumed they were guilty of something." (R., Vol. VII, p. 6). The Trial Judge then asked him if he could lay this opinion aside and go only on the law and evidence heard in court. The juror stated he could. Defense counsel then asked the juror:

> "MR. MYERS: Would it take evidence to remove the opinion that you now have?
>
> JUROR: Well, it would take evidence, yes, sir."
> (R., Vol. VII, p. 7)

The juror also said he discussed the facts of the case with numerous people, that he ran a place of business and hundreds of people came in there and he discussed it with them after they read it in the paper, that "it had a lot of publicity", and he had formed an opinion from what he had read. The juror also stated that his place of business had been broken into, meaning it had been burglarized, and he would require some evidence to remove a doubt in his mind, meaning as to their innocence.

Defense counsel for all the petitioners challenged this juror for cause, but the Trial Judge held him competent, and placed him on the jury, as the eleventh juror.

After all of the foregoing questioning occurred in the presence of the other ten jurors, defense counsel sought to make a motion to have the jury sent out of the court-

room so counsel could make a motion, and the Trial Court stated:

> "THE COURT: No reason to send the jury out now, call the next name."
>
> (R., Vol. VII, p. 8)

Exception was made by counsel to the Trial Court's ruling, to which the Trial Court replied:

> "THE COURT: You except to this Court trying to get this lawsuit tried?
>
> MR. CAMPBELL: No, your Honor, we want to do it in an orderly fashion.
>
> THE COURT: We are doing it in an orderly fashion as far as the Court is concerned. I'm not too sure about some of the lawyers, call the next juror.
>
> MR. CAMPBELL: I except to that statement in the presence of these jurors and I move for a mistrial at this time.
>
> THE COURT: Overrule the motion, call the next juror.
>
> MR. MYERS: In view of what the juror Parrott, who was just examined, said in the presence of this panel, ten of who (sic) occupy the jury box at this time and the rest of the prospective jurors present in the court room, we move that this panel be quashed."
>
> (R., Vol. VII, pp. 9-17)

The Trial Judge overruled this motion. The twelfth juror was selected, and the jury sworn.

When petitioners challenged juror Parrott for cause, petitioners had no peremptory challenges left, and the Trial Court refused to grant the challenge for cause.

All twelve jurors were sent to lunch. After lunch, the juror Parrott was dismissed by the Trial Judge, on his own motion, after the jury had been sworn, and substituted

and seated another juror, over the objection of petitioners, and then the new jury was sworn. Petitioners then moved the Trial Court that they be forthwith discharged because they had been placed in jeopardy, and to try them again would place them in double jeopardy. (R., Vol. VI, p. 3).

(3) Although this case had unusual publicity and had been discussed widely in the neighborhood, which fact was recognized by the Trial Court later when he granted a change of venue in another case growing out of this same matter, the Trial Court refused to grant these petitioners a change of venue, and thus deprived them of a fair and impartial trial.

QUESTIONS PRESENTED

Question No. 1. Were petitioners denied due process of law and equal protection of the law, as guaranteed them under the Fourteenth Amendment to the Constitution of the United States, by reason of their being denied their right to a preliminary hearing after their arrest and before indictment?

Question No. 2. Were petitioners denied due process of law and equal protection of the law, as guaranteed them under the Fourteenth Amendment to the Constitution of the United States, by being placed in double jeopardy?

Question No. 3. Were petitioners denied due process of law and equal protection of the law, as guaranteed them under the Fourteenth Amendment to the Constitution of the United States, by the action of the Trial Court in denying petitioners' motion to quash the jury panel when the jury panel had been polluted by statements made in its presence by a juror that he had read accounts of the charges against the petitioners and had formed an opinion

that they were guilty, because they were found in the place of business, allegedly burglarizing it?

Question No. 4. Were petitioners denied due process of law and equal protection of the law, as guaranteed them under the Fourteenth Amendment to the Constitution of the United States, by refusal of the Trial Court to grant a change of venue?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment:

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

Fourteenth Amendment:

"§ 1. * * * **Due process of law—Equal protection.**— * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TENNESSEE STATUTES INVOLVED

Tennessee Code Annotated:

"**40-604. Examination required before commitment.**— No person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate."

"**40-606. Disposition by magistrate.**—The magistrate is required to reduce the examination of the accused to writing, if he submits to an examination, and also all the evidence adduced on both sides, and is authorized to discharge, bail, or commit the accused and to take all necessary recognizances to enforce the appearance of the defendant, the prosecutor or witnesses, at the proper court."

STATEMENT

See "HOW FEDERAL QUESTIONS ARE PRESENTED", *supra.*

REASONS FOR GRANTING THE WRIT

Question No 1. The question presented here is of major importance and significance to the administration of justice, not only for these petitioners, but for all others similarly situated.

It is important that a defendant, when arrested, be accorded his rights to a preliminary hearing wherein he may be represented by counsel if he has one, and if he does not have counsel, counsel be appointed by the court; wherein he may be apprised of the charges against him; and be confronted with witnesses to support the charge sufficiently to show probable cause; and to have his right to cross-examine such witnesses. These are fundamental rights, which were denied petitioners herein.

This Court in *Anderson* v. *United States,* 318 U.S. 350, 63 S. Ct. 599, took cognizance of Tennessee law requiring that a defendant be taken before a magistrate or other committing officer at the time of his arrest, and the Court found that failure to do so in *Anderson* was a denial of the rights of the accused.

Anderson followed the reasoning of the decision of *McNabb* v. *United States,* 318 U.S. 330, 77 S. Ct. 510, which was decided the same day. In both cases, confessions were held involuntary and illegal. In *McNabb* the confessions were ruled out because defendants were not taken immediately upon arrest before the United States Commissioner for a hearing. In *Anderson* the confessions were ruled out because the accused were not taken before a Tennessee

committing magistrate before they were questioned by F.B.I. agents and statements obtained while in jail.

McNabb and *Anderson* both recognize how fundamental and essential it is that an accused be accorded a preliminary hearing, and both stand for the proposition that a preliminary hearing is essential to due process of law.

The Fourteenth Amendment prohibits denial of due process of law and denial of equal protection of the law, and the prohibition of the Fourteenth applies to all actions of a State by whatever modes such action be taken, whether it be legislative, executive or judicial. *Standard Computing Scale Co.* v. *Farrell,* 249 U.S. 571; *Breithaupt* v. *Abram,* 352 U.S. 432, 77 S. Ct. 408; *Buchalter* v. *People of State of New York,* 319 U.S. 427, 63 S. Ct. 1129.

Question No. 2 and **Question No. 3.** The eleventh juror to come up for selection definitely stated he was prejudiced against petitioners, thought they were guilty, and it would require evidence to remove this doubt from his mind. Petitioners had used all challenges and could not peremptorily challenge this juror, which fact the Trial Judge knew. Defense counsel challenged this juror for cause, and the Trial Judge refused to allow the challenge for cause and seated the juror. The jury was then sworn to try the issues, and the indictment was read, and pleas of not guilty were entered by petitioners. This put the petitioners in jeopardy. The jury was then allowed to go to lunch, and this opinionated juror was permitted to go to lunch and mixed and mingled with the other jurors. After lunch, the Trial Judge on his own motion excused the opinionated juror, and selected another juror, over the objection of petitioners, and then tried the case with this one juror and the other eleven who had already heard the opinionated

juror state his opinion that these petitioners were guilty from what he had read, and from talking with hundreds of people in his place of business.

The Supreme Court of Tennessee in its opinion cites *Thompson* v. *United States*, 155 U.S. 271, 15 S. Ct. 73, an early case of this Court, as authority for its decision that petitioners were not placed in double jeopardy by the aforesaid actions of the Trial Judge. *Thompson* simply holds that courts of justice are vested with the right to *discharge a jury from giving any verdict* when there is a manifest necessity for the act, or the ends of public justice would be otherwise defeated, and to order a trial by another jury. This is not what happened in the instant case. The jury was not discharged. Eleven of the jurors were kept and rendered the verdict of guilt. There was a substitution of only one juror. The Supreme Court of Tennessee could have correctly used *Thompson* as authority for its decision if the Trial Judge had quashed the entire panel, or at least discharged all twelve jurors who had been "polluted" by the statements of the opinionated juror Parrott, and petitioners tried by new veniremen not on the "polluted" panel.

Ordinarily jeopardy attaches when the jury, as in the instant case, is sworn to try the case, *Simmons* v. *United States*, 142 U.S. 148, 12 S. Ct. 171; *Logan* v. *United States*, 144 U.S. 263, 12 S. Ct. 617, the exception being that when necessity for declaring a mistrial and a retrial exist. In the instant case, necessity may have required that the juror Parrott be excused because of the opinion he had expressed. Necessity, however, did not require, and did not permit petitioners being tried before the other jurors who were "polluted" by Parrott expressing his opinion and who had already been sworn before to try the case and who had mingled during the lunch hour with the opinionated juror,

Parrott. See *Himmelfarb* v. *U. S.*, (C.A. 9, 1949) 175 F. 2d 924, cert. denied 338 U.S. 860, 70 S. Ct. 103; *Sanford* v. *Robbins*, (C.C.A. 5, 1940), 115 F. 2d 435, cert. denied 61 S. Ct. 737, 312 U.S. 697.

After juror Parrott was excused by the Trial Court, and after he had given his opinion that petitioners were guilty from what he had read and what he had heard talked in the community, the remaining eleven jurors could hardly have been an impartially selected jury. The right to an impartially selected jury is guaranteed by the Fourteenth Amendment. *Wolfe* v. *Nash*, (C.C.A. 7, 1963) 313 F. 2d 393, cert. denied 374 U.S. 817, 83 S. Ct. 1713.

Question No. 4. Each of the petitioners asked for a change of venue on the ground that because of the publicity which the case had received they could not obtain a fair trial, and the fact that the prosecuting witness, Dr. W. B. Robinson, M.D., had treated eighty per cent of the competent jurors available in the county or their close relatives and close friends it would be impossible to obtain a trial panel of jurors who would not be prejudiced in favor of this prosecuting witness. Said motion was overruled. It appears in the record that the same Trial Judge as in this case, in another case in his court wherein petitioner Collins' brother was accused of intimidating the prosecuting witness in this case, Dr. Robinson, and was indicted in the same court as these petitioners, and motion was made on the same grounds as petitioners' motion, recognized the merits of the brother's motion and transferred his trial to another county. The fact that this case had received such publicity that petitioners could not obtain a fair trial is shown by the questioning of juror Parrott and his answers in the following colloquy between defense counsel and juror Parrott:

"MR. MOSES: Have you discussed the facts of the case with anybody?

JUROR: Sir, can I answer that?

THE COURT: Yes, sir.

JUROR: I run a place of business down here, and people talk. Hundreds of people come in there and discussed it after they read it in the paper, it had a lot of publicity."

(R., Vol. VII, p. 7)

Where publicity destroys the fairness of a trial, as in this case, a new trial should be granted. *Shepard* v. *Maxwell,* 384 U.S. 333, 86 S. Ct. 1507.

RELIEF

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Knoxville, Tennessee
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ALBERT COLLINS, RALPH BAYLESS, RALPH ATKINS, and WENDELL LOVEDAY

v.

STATE OF TENNESSEE

COCKE CRIMINAL
Hon. George R. Shepherd, Judge.

For Plaintiffs in Error:
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Knoxville, Tennessee
For Collins

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Newport, Tennessee
For Loveday

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Newport, Tennessee
For Bayless and Atkins

For the State:
Thomas E. Fox
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OPINION

(Filed March 10, 1967)

The plaintiffs in error were indicted and convicted of breaking and entering a business place with the intent to commit larceny (burglary in the third degree). They were each sentenced to serve not less than three nor more than five years in the State penitentiary. From this conviction an appeal was prayed, briefs and arguments were filed on behalf of certain defendants and there were affidavits, etc., filed in behalf of others. Assignments of error were likewise filed in behalf of two of the plaintiffs in error wherein counsel was employed by these two plaintiffs in error, Loveday and Collins; and from certain pleadings in

the record assignments can be gathered as to the two indigent plaintiffs in error.

The prime insistence as to all the defendants is that they were twice put in jeopardy by the trial court's action in dismissing one of the jurors after this juror, Theo Parrott, had been sworn but before any evidence was introduced and the selection of another juror. It is argued in behalf of Loveday and Collins that the evidence preponderates against the verdict and in favor of their innocence, or as to Loveday it is argued that there is no evidence at all to support the verdict. It is likewise assigned as error that the trial court committed error in admitting into evidence a pair of unidentified gloves, and that the District Attorney General erroneously argued to the jury that the defendants were professional criminals.

The motion for a new trial was overruled on January 28, 1966. An order was then entered allowing sixty days from that date for preparing and filing a bill of exceptions. The bill of exceptions was not filed until April 12, 1966, or thirteen days after the time for filing had expired. Under such a situation we do not have jurisdiction to consider the bill of exceptions, T.C.A. §27-111, and numerous cases cited as a footnote to this Code Section. We though for reasons stated in *Russell* v. *State ex tel Arthur*, ... Tenn. ....., 401 S.W.2d 586, have reviewed the contents of what purports to be the bill of exceptions as if the same had been filed in accordance with T.C.A. §27-111, supra. Insofar as the plaintiffs in error, Atkins and Bayless are concerned it being indicated in this record that they are indigent, but this is not specifically found, counsel were appointed to represent them on this assumption at least, and thus considering this record as to these indigents under the reasoning of the *Arthur* case, supra, we likewise are apprised of all errors and complaints of Loveday and Col-

lins; consequently, what we say herein will apply to their complaints as well.

The chief argument and complaint of Loveday is that there is no evidence to support a conviction or to find that he was an aider and abettor in this burglary. Of course, if we take Loveday's statements and accept what he says as the truth of the situation his contention is correct, but upon examination of this record we find that there is ample material evidence upon which the jury found that he was an aider and abettor in this burglary and consequently under numerous authorities the jury having heard all of this and accepted it and the evidence not preponderating against it, we cannot reverse. See *Cooper* v. *State*, 123 Tenn. 37, 138 S.W. 826; *McBee* v. *State*, 213 Tenn. 15, 372 S.W.2d 173.

Loveday testified in his own behalf that he parked his car a short distance from Dr. Robinson's office (this is where the theft took place) while the burglary was in progress, not knowing anything about it; that he "pulled up in there and backed up in there to fix my foot feed". Loveday was found by the officers parked a short distance from this doctor's office while the burglary was in progress. His car was backed off Cosby Road onto a little road leading toward the high school with the car facing the doctor's office. The officers found in his car a pair of brown cotton gloves of the same type found on some of the other defendants who were caught inside the building being burglarized. Loveday likewise, when the officers drove up, laid down on the seat of his car. He made an explanation about his business there, but apparently this explanation was not satisfactory to the jury and apparently to them, as it is to us, it seemed so unplausible that it really amounted to some evidence of his guilt.

The other three defendants, that is Collins, Atkins and Bayless, were found in the doctor's office which was being burglarized. All of these plaintiffs in error took the witness stand and admitted the fact that they were caught in the doctor's office. Atkins and Bayless were found first. They were wearing a paid of brown cloth gloves, and it was their insistence that they were just pretending a burglary at the insistence of Dr. Robinson and that he had agreed to pay them $200.00 apiece for such a performance during the month of November prior to the burglary on Christmas night for which they were convicted. The other plaintiff in error, Collins, was found hidden in a different room of this doctor's office or clinic after Bayless and Atkins had been removed to jail. According to Collins he came there to see Dr. Robinson to purchase some "red devils", and hid in the room at the insistence of Dr. Robinson (apparently Dr. Robinson was the prosecutor) because somebody else was coming in the back door of the building.

The jury after hearing all this evidence pro and con including that of these four defendants credited the State's evidence and refused to accept the theory of the defendants as revealed by their testimony. After having read this we can very easily understand why the jury reached the verdict that it did. Thus it is, under the authority of the *Cooper* and *McBee* cases, supra, and many others, the verdict should not, and will not, be disturbed by us.

The key defense of all of these men hinges around their plea of former jeopardy. There is in the file, which was filed after the record was filed in this Court, an affidavit of counsel for Collins, setting forth a copy of the void dire wherein this question arose. There is also a statement made by the trial judge in a long memorandum that he filed in overruling the motions for a new trial which shows this fact. In examining the prospective jurors, one Theo Parrott was asked:

"Have you formed any opinion about the guilt or innocence of these defendants?

"JUROR: Of course, I read it in the papers and they were caught in the doctor's office. I just assumed they were guilty of something."

He was then challenged for cause. After this was done the court asked and said to this prospective juror:

"He just answered the question that the lawyer asked, if you are accepted as a juror, can you, and will you, lay aside that opinion and go entirely by the law which I give you and the evidence given here, regardless of what it is, whether it is favorable to the defendant or to the state?

"JUROR: Yes, sir."

Then it was that the trial court declared him a competent juror and had him seated. When the jury was thus complete the trial court swore the jury and, after various arguments about motions and objections to this juror, Parrott, that the statements he had made influenced the rest of the panel, and things of the kind, a recess was taken for lunch. When they returned from lunch, the court excused this juror, Parrott, and another juror was then selected and placed on the jury and the jury was again sworn, the indictment read, etc., and the trial proceeded which resulted as heretofore shown.

All peremptory challenges under the statute had been exhausted and after they were all exhausted this motion was made challenging the array predicated upon the statement of the juror, Parrott, who was later excused after lunch. After this juror was sworn and the indictment was read and the defendants entered a plea of not guilty, there was no proof offered at that time. The trial judge in his statements in overruling the motion for a new trial said that since the defendants were all complaining about this

juror that he then excused him after first accepting him and that this would not amount to putting these men in double jeopardy. In other words the challenge for cause as to juror, Parrott, was allowed after he had first been accepted. A serious question is thus raised as to the question of double jeopardy.

An accused is in jeopardy under the majority of opinions of the courts of this country after the jury is properly impaneled and sworn. See an ample reasonable discussion of this question in Wharton's Criminal Law and Procedure, Vol. 1, beginning at page 308. There have been many exceptions over the years to this general statement. Of course, if we take the statement on its face there would be no question about sustaining the plea herein. By the way, concerning the statement made about when jeopardy attaches, see *State* v. *Conner,* 45 Tenn. 311, as one of the first cases in this State supporting this proposition. There are many others written along about this time wherein some of the exceptions were noted and acted on, but the general rule has been the same down through the years throughout the county. At page 318 of Wharton's, supra, the author says:

> "The only causes for which a jury empaneled and sworn to try the defendant on a criminal charge can be discharged by the court without a verdict without such discharge acting as a bar to a subsequent prosecution for the same offense are (1) the consent of the defendant or his counsel; (2) illness or insanity of (a) one of the jurors [under this heading our case of *DeBerry* v. *State,* 99 Tenn. 207, 42 S.W. 31, is cited] (b) the defendant or (c) the court; (3) absence of a juryman; (4) impossibility of jurors' agreeing on a verdict after a reasonable time for deliberation has been allowed; (5) some untoward accident that renders a verdict impossible; and (6) extreme and overwhelming physical or legal necessity."

And further, "It is thus stated that the court may discharge a jury without working an acquittal of the defendant, in any case when the ends of justice, under the circumstances, would otherwise be defeated." Wharton's Criminal Law & Procedure, supra, pages 322 and 323.

The State argues that the principle as applied in *DeBerry* v. *State*, supra, is applicable in the instant case. In the *DeBerry* case a juror became sick, was excused and another juror impaneled. This was done under T.C.A. §22-221, which was repealed by the General Assembly of 1959. The Court in the *DeBerry* case held under this statute a juror becoming sick could be excused and a new juror impaneled and that double jeopardy had not attached, therefore it is reasoned by the State that nothing having been done in this instance except the jury having been sworn that this was practically the same as a juror having become ill being excused.

The closest case though that we have found to the situation here is that of *Green* v. *State*, 147 Tenn. 299, 247 S.W. 84, wherein after a juror was sworn he arose from his place in the box and stated that he did not believe that a Christian should have anything to do with punishing people, etc. After this juror did this he was excused and another juror impaneled in his place and the case was tried. This Court held there that recognizing the rule we have announced heretofore that it amounted to double jeopardy when a jury was sworn to try the issue upon the indictment and plea thereto and before the reading of the indictment or introduction of testimony, citing authorities, but held this juror there having said what he did and being excused did not amount to double jeopardy. This *Green* opinion is a well written one by Special Justice L. D. Smith. He reviews a number of our cases as well as many United States Supreme Court cases,

and among other things he quotes from *State* v. *Waterhouse,* Mart. & Y., 279, a paragraph, to-wit:

> "The supreme court of the United States, fitted more than any other tribunal, from the necessary habits and researches of its members, to decide upon American constitutional law, have, without, so far as I can discover, a dissenting voice, held, that a court, in the exercise of a sound discretion, may discharge a jury, even in a capital case; and that the defendant may be again tried."

This opinion goes on to say that the tendency to make exceptions to the general rule is done only in cases of necessity and that we in this State have recognized no discretion in the action of the trial judge beyond limits of actual necessity. The discharge of a juror for causes *propter defectum* has by this Court universally been held as placing the accused in jeopardy and entitles him to be discharged. See such cases as *Ward* v. *State,* 20 Tenn. 253; *State* v. *Connor,* 45 Tenn. 311; *Tommason* v. *State,* 112 Tenn. 600, 79 S.W. 802; and *Walker* v. *State,* 118 Tenn. 375, 99 S.W. 366. In reading these cases we find many English cases, as well as cases from other states, are interestingly and intelligently reviewed, and the Court correctly says in the *Green* case, supra, that:

> "A distinction is clearly recognized in our cases between causes *propter defectum* and causes which show that the juror had prejudged the case, or who by virtue of his state of mind could not, or would not, in fact pass upon the guilt or innocence of the accused. *Cartwright* v. *State,* 12 Lea, 620; *Brakefield* v. *State,* 1 Sneed, 218."

The reading of these cases and cases generally over the country confirm without a doubt the correctness of this statement. This is the reason that the trial judge sustained the challenge or plea as to the juror, Parrott, and excused

him and then impaneled another juror, because he felt that maybe from these statements that this juror had prejudged this case, and, bending backwards in a hotly contested trial, he excused this juror and placed another on the panel. In doing so, we think double jeopardy does not attach. Among other cases cited by the Court in the *Green* case, supra, the author of that opinion quotes from *Thompson* v. *U. S.*, 155 U.S. 271, 15 S. Ct. 73, 39 L. Ed. 146, thus:

> "Courts of justice are vested with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy."

We feel under the record in the instant case that to maintain the judicial process and utmost fairness to all of these defendants that this juror was excused so that these men could have a fair trial and that by doing this there has been no double jeopardy which attached so as to allow these men to go without being tried for the offense admittedly here committed.

The assignment of error complaining about the cotton gloves—that they were considered without being properly identified as an exhibit—is not argued but it appears in this record that the gloves were made an exhibit to the Sheriff's testimony. It is clear that it was the intention of the State to make the pair of gloves an exhibit to the Sheriff's testimony which were found on Collins' hands when he was arrested. The prosecutor, Dr. Robinson, testified that the three defendants found in the building were wearing brown cotton gloves; the Sheriff said the gloves were all alike. We are unable to see that there is any substance to this assignment of error.

The argument of the District Attorney General is not contained in what purports to be the bill of exceptions. This being true, we cannot consider it. *Beadle* v. *State*, 203 Tenn. 97, 310 S.W.2d 157. But, even if the statement complained of was in the bill of exceptions, it seems to us it was a perfectly proper inference that could be drawn from this record that these defendants had certain knowledge of burglarizing a place of this kind and would justify the attorney for the State in arguing that they were professionals. As we heretofore pointed out two of the plaintiffs in error had testified, and it was their defense, that they had been employed prior to this occasion to burglarize this place by the prosecutor here.

We have carefully gone over this matter and are satisfied that there is no error herein, and thus it is that the judgment of the trial court must be affirmed.

/s/ Hamilton S. Burnett
Hamilton S. Burnett, Chief Justice.

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IN THE

SUPREME COURT OF THE UNITED STATES.

ALBERT COLLINS, RALPH ATKINS and WENDELL LOVEDAY,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI.

The petitioners, Albert Collins, Ralph Atkins, and Wendell Loveday, seek a review of a Tennessee State Supreme Court decision affirming their convictions for burglary for which they were sentenced to serve not less than three nor more than five years in the State Penitentiary.

The decision of the Tennessee Supreme Court was not designated for publication but a copy of the same has been attached to the petition by way of an appendix.

Counsel for the State of Tennessee concedes the jurisdiction of this Court to review a judgment of the Tennessee State Supreme Court affirming a criminal conviction, but it is denied that the requirements for invoking the jurisdiction of this Court on the question of venue raised in the petition have been met in that the question was not presented or passed upon by the Tennessee Supreme Court. It was apparently abandoned by petitioners after the matter was passed upon by the trial court preliminary to the trial.

QUESTIONS PRESENTED.

1. Whether or not the petitioners were denied due process of law under the Tennessee procedure required by Section 40-402, Tennessee Code Annotated, that accused persons brought before a Magistrate during a session of the grand jury in the county where the offense was committed be bound over to the grand jury without a hearing before the Magistrate or General Sessions Judge, as the case may be.

2. Whether or not the petitioners were denied due process of law by the action of the trial judge after the jury had been sworn and petitioners pleaded not guilty in the criminal proceeding but before any evidence was presented in dismissing one of the jurors, selecting another in his place, and proceeding with the trial.

3. Whether or not the petitioners in this case should have been granted a change of venue because of the publicity given the case in the county prior to trial and because the prosecuting witness, Dr. W. B. Robinson, had performed medical services for 80% of the competent jurors in the county where the offense was committed.

ARGUMENT.

1. Section 40-402, Tennessee Code Annotated, is as follows:

> "40-402. Binding over to grand jury.—Whenever any person is brought before a justice of the peace of this state upon a warrant for any criminal offense or misdemeanor, if the grand jury of the county where the offense is charged to have been committed is in session, the said justice of the peace shall not try the case, unless the defendant pleads guilty, but shall, if the offense charged is bailable, take bond of the defendant in such sum as now prescribed by law for the offense charged for his appearance before the court in charge of or impaneling said grand jury, from day to day, pending an investigation of said offense by said grand jury. If the case is not bailable, or if the defendant fails to give the bond required, he shall be committed to jail, pending the investigation, the warrant and the bond, if any be given, to be at once transmitted to said court. Provided that this section shall not apply to cases triable under § 40-408."

The Supreme Court of Tennessee has construed this statute on several occasions. Its opinions in **Davis v. State, ex rel.**, 104 Tenn. 553, 58 S. W. 237, and **State ex rel. Wood v. Johnson**, 216 Tenn. 531, 393 S. W. 2d 135, are appropriate in reply to the first question raised by counsel for the petitioners. An excerpt from the first of those opinions at Page 558, Tennessee Supreme Court Reports and Pages 238-239 of the Southwestern Report is as follows:

> "We are of opinion that the object and purpose of the law is to provide that, while the Criminal Court is in session and a grand jury is impaneled

and authorized to act (which they can do at any time until they are discharged), it is the duty of the Justice of the Peace, in bailable cases, to bind over persons accused of crime and arrested therefor to the Court in charge of or impaneling the jury, from day to day, pending an investigation of the offense by said grand jury. When the Court is not in session, and there is no grand jury impaneled, then the Justice shall hear the evidence and try the case and bind over the accused or not, as he may find the facts to justify. In other words, while the Court is in session and a grand jury is impaneled and authorized to act, whether in continuous and daily sessions or not, Justices shall bind persons accused over to the Court without a preliminary investigation; but if the Court is not in session, or there is no grand jury authorized and impaneled to act, then the Justice shall go into preliminary investigation of the facts, and bind or not, as occasion requires. But it is not necessary that the grand jury shall sit continuously, or day after day, but their sessions may be so timed as the business before them demands."

An excerpt from the case of **State ex rel. Wood v. Johnson** at Page 535 of the Tennessee Supreme Court Reports and Page 136 of the Southwestern Report is as follows:

"It is next contended the petitioner was not given a preliminary hearing. By the terms of T. C. A., sec. 40-402, it is provided that, if the grand jury of the county where the offense is charged to have been committed is in session, the magistrate shall not try the case but shall take bond of the defendant, if the offense charged is bailable, for the defendant's appearance before the court in charge of, or empaneling, the grand jury. It is not averred that the Knox County Grand Jury was not at the time in session. See Dillard v. Bomar, 6 Cir., 342 F. 2d 789. This

averment of the petition does not allege a violation of a constitutional right. United States ex rel. Kassin v. Mulligan, 295 U. S. 396, 400, 55 S. Ct. 781, 79 L. Ed. 1501, Dillard v. Bomar, supra."

The United States Circuit Court of Appeals, Sixth Circuit, considered the question thoroughly in the case of **Dillard v. Bomar**, 342 F. 2d 789. An excerpt from Page 790 of that opinion is as follows:

> "We do not find that the Supreme Court has ever held that an accused has a constitutional right to a preliminary hearing. On the contrary, we construe the opinions in Goldsby v. United States, 160 U. S. 70, 73, 16 S. Ct. 216, 40 L. Ed. 343; United States ex rel. Kassin v. Mulligan, 295 U. S. 396, 400, 55 S. Ct. 781, 79 L. Ed. 1501, and Beavers v. Henkel, 194 U. S. 73, 84-85, 24 S. Ct. 605, 48 L. Ed. 882, as saying that an accused has no such constitutional right."

Cases cited and relied upon by counsel for the petitioners, **Anderson v. United States**, 318 U. S. 350, 63 S. Ct. 599, and **McNabb v. United States**, 318 U. S. 330, 77 S. Ct. 510, are not applicable to the present question. They have to do with the taking of confessions from defendants. They do not touch the question of whether or not a defendant in a criminal case has a constitutional right to a preliminary hearing.

2. The twelfth juror was challenged for cause upon the grounds that he had formed an opinion as to the guilt of the petitioners (defendants in the criminal case) because of what he had read and heard in the community regarding the offense. The trial judge, after the witness had stated that he could lay aside any previously formed opinions and decide the case in accordance with the law and the evidence, overruled the challenge for cause. Counsel for the petitioners had used up their peremptory challenges. The indictment was then read in the presence

of the jury. The petitioners pleaded not guilty and the court recessed for lunch. After lunch, the court, having had an opportunity to think more about the matter, excused the juror in question and another was selected in his stead. Counsel for the petitioners immediately began to insist that the procedure had the effect of putting the petitioners in jeopardy and that insistence is still being made for the petitioners.

The Supreme Court of Tennessee dealt with a similar problem in **Green v. State**, 147 Tenn. 299, 247 S. W. 84. The holding in the **Green** case was bottomed upon **Simmons v. United States**, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968; **Logan v. United States**, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429; and **Thompson v. United States**, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146. After considering these authorities, the Tennessee Supreme Court made the following statement:

> "The general modern rule is that the court may discharge a juror without working an acquittal of the defendant in any case, where the ends of justice, under the circumstances, would otherwise be defeated. 8 R. C. L., p. 153; 16 R. C. L., p. 319."
>
> 147 Tenn. 299, 307, 247 S. W. 84, 86.

3. A motion for change of venue was made on the grounds that the prosecuting witness, Dr. W. B. Robinson, "has treated 80% of the competent jurors available in the county or their close relatives or close friends" and that it would be impossible to obtain a fair trial in the county where the offense was committed and where they were tried. They assign as another ground "the matters surrounding this case have been highly publicized in the Knoxville News-Sentinel and the Knoxville Journal and on the Knoxville television and radio circuits . . ." The order overruling the motion for change of venue recites "the State joined issue on the question of fact after hear-

ing the proof introduced at the hearing and after hearing argument of counsel, the State is of the opinion that the motion for change of venue is not well taken". By this statement it is submitted that the facts alleged to the effect that the doctor had treated 80% of the competent jurors or their close friends and relatives in the county were true and that the case had been highly publicized through the Knoxville news media—newspapers, radio, and television. (It is not shown that Knoxville, Tennessee, is the county seat of Knox County and is forty-six miles from Newport, the county seat of Cocke County, Tennessee, where the case was tried.)

The conclusions resulting from these facts to the effect that the petitioners could not obtain a fair trial, etc., were not admitted to be true, but the ultimate conclusion for the Court itself to determine. The trial judge properly ruled that the jurors were not disqualified because 80% of them or their friends or relatives had been treated by the State's prosecuting witness, Dr. W. B. Robinson; or that the publicity given the suit through the Knoxville news media—newspapers, television, and radio some distance from the county where the case was tried was sufficient to render it impossible for a jury free from bias and prejudice to be selected.

This question relative to a change of venue was raised in the motion for a new trial but abandoned by the time the case reached the Tennessee Supreme Court. Consequently, it was never considered by the Tennessee Supreme Court and for that reason, should not be considered by this Honorable Court. United States Supreme Court Rule 16 (b) is as follows:

> "The Court will review a motion to dismiss an appeal from a state court on the ground that it does not present a substantial Federal question; **or that the Federal question sought to be reviewed was not**

timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis."

In view of the foregoing, it is insisted by counsel for the State of Tennessee that the writ of certiorari should not issue in this case and that the judgment of the Supreme Court of Tennessee affirming the convictions of the petitioners on a charge of burglary be affirmed.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

Certificate of Service.

I certify that I forwarded a copy of this Reply to Petition for Writ of Certiorari to the Honorable William Earl Badgett, Attorney at Law, 608 Bank of Knoxville Building, Knoxville, Tennessee, on this the 19 day of June, 1967.

Thomas E. Fox,
Assistant Attorney General.